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What is the autonomy of EU law, and why does that matter?

Niamh Nic Shuibhne *

Abstract

This article argues that the autonomy of EU law and of the EU legal order collects together a set of rules and principles but also constitutes a principle of EU law on its own terms. Autonomy as a principle of EU law has acquired specific characteristics that suggest a distinctive existential character, in light of its internal and external reach but, more particularly, a quality of extremity that has come to define its implications. Reflecting on the nature of autonomy matters because of the closing down of space for compromise that it produces and for what is uncovered about the nature of EU primary law in consequence. The development and effects of autonomy have manifested mainly in connection with the jurisdiction of the Court of Justice, but the wider focus on autonomy of 'Union decision-making' as a 'core principle' of ongoing Brexit negotiations, for the EU part, may activate a more generalised understanding of what the principle commands. That process will also test, then, the extent to which an extreme understanding of autonomy as an existential principle should be sustained.

Keywords

Autonomy; general principle; structural principle; existential principle; Court of Justice; Brexit

1. Introduction

In *Van Gend en Loos*, the Commission argued that 'judged by the international law of contract and by the general legal practice between States, the European Treaties represent a far-reaching legal innovation and that it would be wrong to consider them in the light *only* of the general principles of the law of nations'.¹ Here are seeds of the enduring sense that the EU legal order is distinctive. The autonomy of EU law expresses elements of that distinctiveness in concrete, legally meaningful ways. In essence, it serves to establish boundaries around the extent to which the EU legal order can interact with both national legal orders and the international legal order, reflecting a basic understanding of autonomy as 'self-rule' in many respects. But the underlying starting point of establishing and protecting the EU legal order as something *distinctive* has also produced a very particular, very powerful and often controversial conception of autonomy. It is, after all, the principle that has defeated commitments made by the EU and/or the EU Member States in the spheres of external cooperation,² investment,³ financial sanctions⁴ and intellectual property,⁵ and it has stalled the (Treaty-mandated) accession of the EU to the ECHR.⁶

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¹ AG Roemer in Case 26/62 *Van Gend en Loos*, EU:C:1962:42 ([1963] ECR 1, p20, emphasis in original).

² E.g. Opinion 1/91 (EEA Agreement I), EU:C:1991:490.

³ E.g. Case C-284/16 *Achmea*, EU:C:2018:158

⁴ Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Bakaraat International Foundation*, EU:C:2008:46.

⁵ Opinion 1/09 (Draft agreement on the European and Community Patents Court), EU:C:2011:123.

⁶ Opinion 2/13 (Draft agreement on accession to the ECHR), EU:C:2014:2454.

This article reflects on two core questions overall: what *is* the autonomy of EU law, and why should we be asking that question in the first place? To contribute to understanding about the nature and implications of autonomy, the discussion is structured around three main claims: first, that autonomy of EU law not only collects together a set of rules and principles but also constitutes a principle of EU law on its own terms; second, that autonomy as a principle of EU law has been shaped around specific characteristics that generate an acutely ‘existential’ character; and, third, that the ongoing Brexit process has activated a more generalised understanding and application of autonomy beyond the Court-rooted context in which its force has been felt most intensively to date. Fundamentally, questions about the anatomy of autonomy as a principle matter because of what they reveal about the underexamined nature and workings of EU primary law.

In Section 2, the qualities of autonomy are outlined at a general level, tracing the making of the principle and the articulation of its main characteristics through the case law of the Court of Justice. This discussion focuses on the autonomy of EU law and/or of the EU legal system and/or of the EU legal order, all of which are terms used by the Court but usually in proximity to each other. What autonomy produces beyond the sum of these parts is then examined in Section 3. Here, it is argued that autonomy of EU law represents something that has become ‘fundamental to the *existence* of the [Union]’⁷ – that it has become an ‘existential’ principle of Union law. This characterization is drawn from both its scope (i.e. it has internal and external effects) and, in particular, the extremity of its impact when invoked. It is argued that such an extreme conception of autonomy is more a contrived than inherent outcome, connecting to questions about whether the autonomy of EU law is more about securing the authority of the Court of Justice than sustaining the self-rule capacity of the EU as a system. In this sense, however, autonomy is not just about who may exercise the power to determine interaction with other systems; but about the extent to which the application of autonomy to an existential degree has closed off the potential for such interaction.

In Section 4, the function of the autonomy of *Union decision-making* as part of the Brexit negotiation process is examined to demonstrate that the principle of autonomy has more generalizable reach than its predominantly Court-focused history to date. In many respects, autonomy seems still to reflect in this broader context the extreme qualities of existential principle. Adapting the Brexit-familiar idea of ‘red lines’ to explain this, autonomy sets down not political choices but legal boundaries beyond which no EU actor can legitimately pass. The degree to which Brexit compromises may yet be made (or not made) on the EU side will necessarily reveal more about autonomy and, more particularly, about whether or where some limits to the extremity of its impact might be conceived.

⁷ Case 149/79 *Commission v Belgium*, EU:C:1980:297, para. 19 (emphasis added); here, in the context of precluding ‘recourse to the provisions of the domestic legal systems’ to preclude impairment of the ‘unity and efficacy’ of Union law; the unity of Union law returned to in section 3.2 below.

2. The Qualities of Autonomy

It is, and has always been, a fundamental concern of the Court of Justice that EU law ‘must be *effectively* and *uniformly* applied throughout the whole of the [Union]’.⁸ A series of ‘specific’⁹ characteristics of EU law then follow, ‘relating to the constitutional structure of the EU, which is seen in the principle of conferral of powers referred to in Articles 4(1) TEU and 5(1) and (2) TEU, and in the institutional framework established in Articles 13 TEU to 19 TEU’.¹⁰ Additionally, ‘[t]o these must be added the specific characteristics arising from the very nature of EU law’¹¹ – notably the supranationally derived principles of interpretation that determine the relationship between national and EU law (primacy and direct effect).¹² These ‘essential characteristics of the EU and its law’¹³ generate implications for the EU legal system: the Court continues to affirm that the EU has a ‘new kind of legal order, the nature of which is peculiar to the EU, its own constitutional framework and founding principles, a particularly sophisticated institutional structure and a full set of legal rules to ensure its operation’.¹⁴

Especially for present purposes, the Court has stressed the *independence* of this system – its autonomy – relative to the legal systems of the Member States¹⁵ and to the international legal order.¹⁶ In fact, ‘the autonomy of EU law with respect both to the law of the Member States and to

⁸ Case 26/62 *Van Gend en Loos*, EU:C:1963:1 ([1963] ECR 1, p7, emphasis added), noting the submission of the Commission.

⁹ Opinion 2/13, supra note 6, para. 161, referring to Protocol (No 8) relating to article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms. While the ‘specific characteristics’ of Union law are referred to in Article 1 of the Protocol and in a Declaration (on Article 6(2) of the Treaty on European Union), Article 2 covers the autonomy of EU law – in the sense of the ‘essential characteristics of the EU and its law’ presented below – through its stipulation that ‘accession of the Union shall not affect the competences of the Union or the powers of its institutions’. For a different view, see C Contartese, ‘The Autonomy of the EU Legal Order in the ECJ’s External Relations Case Law: From the “Essential” to the “Specific Characteristics” of the Union and Back Again’, 54:6 *Common Market Law Review* (2017) p.1628.

¹⁰ Opinion 2/13, supra note 6, para. 162.

¹¹ Opinion 2/13, supra note 6, para. 166.

¹² *Van Gend en Loos*, supra note 8; Case 6/64 *Costa v ENEL*, EU:C:1964:66.

¹³ *Achmea*, supra note 3, para. 33.

¹⁴ Opinion 2/13, supra note 6, para. 158. See generally, S Weatherill, ‘From Myth to Reality: The EU’s “New Legal Order” and the Place of General Principles Within It’ in S Vogenauer and S Weatherill (eds.), *General Principles of Law: European and Comparative Perspectives* (Hart Publishing, Oxford, 2017) pp.21-38. More recently, the Commission conveys this distinctiveness by describing the EU as a ‘unique ecosystem underpinned by instruments and structures that cannot be separated from each other’ (European Commission, Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU, Internal EU27 preparatory discussions on the framework for the future relationship: “Regulatory Issues”, 21 February 2018, <ec.europa.eu/commission/sites/beta-political/files/slides_regulatory_issues.pdf>, visited on 24 May 2018).

¹⁵ E.g. *Van Gend en Loos*, supra note 8, p12; *Costa v ENEL*, supra note 12.

¹⁶ E.g. *Kadi*, supra note 4; see further, AG Poiares Maduro (EU:C:2008:11), para. 21 of the Opinion.

international law is justified by the essential characteristics'.¹⁷ At the same time, however, the Court constitutes a paradoxical *interdependency* of the 'legal relations' between the EU and its Member States that also characterizes the system, since '[t]hese essential characteristics of EU law have given rise to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other, which are now engaged, as is recalled in the second paragraph of Article 1 TEU, in a "process of creating an ever closer union among the peoples of Europe"'.¹⁸ It is not just, then, a merging of sovereignties;¹⁹ but a concession of national autonomy that feeds into the construction and operation of EU autonomy. In *Costa v ENEL*, AG Lagrange had already expressed this idea, referring to a 'legal system *separate from* that of the Member States, but nevertheless intimately and even organically tied to it in such a way that the mutual and constant respect for the respective jurisdictions of the [Union] and national bodies is one of the fundamental conditions of a proper functioning of the system instituted by the Treaty and, consequently, of the realization of the aims of the [Union]'.²⁰ To summarize how autonomy was then developed in the case law of the Court, the following discussion is structured around three of its dimensions: purposive, substantive, and institutional.

The *purposive* dimension of autonomy is essentially that this '*particular* legal order' enables pursuit of the particular aims and objectives of the Union.²¹ This is the context in which the internal workings of the EU legal order are shielded from external intrusions on their functioning,²² where 'external' intrusions also means insulation from national legal orders.²³ Here, then, we start to see a legal order 'separate from' manifesting not just a basic concern for self-rule, but also an impulse towards self-reference. Its specialness is generated, for the Court, through the 'fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be

¹⁷ *Achmea*, supra note 3, para. 33.

¹⁸ Opinion 2/13, supra note 6, para. 167. Similarly, '[t]he EU legal order is interdependent and interwoven with the national legal orders both, functionally and in substance. The autonomous legal orders do not exist separately from each other' (I Pernice, 'The Autonomy of the EU Legal Order – Fifty Years after *Van Gend*' in A Tizzano, J Kokott and S Prechal (Eds.), *50th anniversary of the judgment in Van Gend en Loos, 1963–2013*, conference proceedings, Luxembourg, 13 May 2013 (Office des publications de l'Union européenne, 2013), p.62.

¹⁹ AG Roemer in *Van Gen den Loos*, supra note 1, p12.

²⁰ AG Lagrange in Case 6/64 *Costa v ENEL* (EU:C:1964:51, [1964] ECR 585, pp605-606, emphasis added).

²¹ Opinion 1/91, supra note 2, para. 50 (emphasis added); see further, Opinion 2/13, supra note 6, para. 172, referring to 'the implementation of the process of integration that is the *raison d'être* of the EU itself'.

²² E.g. Opinion 1/00 (Proposed agreement between the European Community and non-Member States on the establishment of a European Common Aviation Area), EU:C:2002:231, para. 13.

²³ E.g. Case 283/81 *CILFIT*, EU:C:1982:335, esp. para. 19: '[Union] law uses terminology which is peculiar to it. Furthermore, it must be emphasized that legal concepts do not necessarily have the same meaning in [Union] law and in the law of the various Member States'.

recognised and, therefore, that the law of the EU that implements them will be respected'.²⁴ The bonded nature of the relationship between the EU and its Member States is fortified by the principle of sincere cooperation.²⁵ Reflecting the fundamental nature of trust and cooperation, what we might term the *standard of breach* of autonomy then tends to be expressed in simultaneously severe and mild terms: contrasting the language of *what* is breached, on the one hand – 'undermined', 'essential', 'preservation' 'very foundations of the Union', 'threat posed', etc – with even a likelihood that autonomy might be 'adversely affected', on the other.²⁶ This point is returned to in Section 3.2 below.

At face value, the *substantive* dimension of the autonomy of EU law is not strongly developed beyond the protection of fundamental rights. In that respect, the Court has ruled that 'the review by the Court of the validity of any [Union] measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the [TFEU] as an autonomous legal system which is not to be prejudiced by an international agreement'.²⁷ Reflecting the understanding already expressed in the explanations,²⁸ the Court has identified the purpose of Article 52(3) of the Charter of Fundamental Rights as seeking 'to ensure the necessary consistency between the rights contained in it and the corresponding rights guaranteed by the ECHR, without thereby adversely affecting the autonomy of EU law and that of the Court of Justice of the European Union'.²⁹

However, the self-referential quality of autonomy also comes through in the substantive dimension. For example, the Court asserts in Opinion 2/13 that '[t]he autonomy enjoyed by EU law in relation to the laws of the Member States and in relation to international law requires that the interpretation of those fundamental rights be ensured within the framework of the structure and objectives of the EU'.³⁰ The standards that really matter, then, are the standards set by the EU. The priority accorded to the EU *system-specific* interpretations of EU measures that filters into the EEA

²⁴ Opinion 2/13, *supra* note 6, para. 168; on mutual trust in the context of ASFJ, see paras 191-194.

²⁵ *Achmea*, *supra* note 3, para. 58.

²⁶ E.g. Opinion 1/91, *supra* note 2, paras 29, 35 and 47; Opinion 1/00, *supra* note 22, paras 5 and 12; *Achmea*, *supra* note 3, para. 59.

²⁷ *Kadi*, *supra* note 4, para. 316; see also, paras 281-284, and Opinion 2/13, *supra* note 6, paras 168-170.

²⁸ 2007 OJ C303/17. See further, AG Trstenjak in Case C-411/10 *NS* (EU:C:2011:611), para. 146 of the Opinion: 'the judgments of the European Court of Human Rights essentially always constitute case-specific judicial decisions and not the rules of the ECHR themselves, and it would therefore be wrong to regard the case-law of the European Court of Human Rights as a source of interpretation with full validity in connection with the application of the Charter. This finding, admittedly, may not hide the fact that particular significance and high importance are to be attached to the case-law of the European Court of Human Rights in connection with the interpretation of the Charter of Fundamental Rights, with the result that it must be taken into consideration in interpreting the Charter'.

²⁹ Case C-18/16 *K*, EU:C:2017:680, para. 50. Article 52(3) of the Charter provides that '[i]n so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection'.

³⁰ Opinion 2/13, *supra* note 6, para. 170.

system is an example.³¹ Seen in this way, the substantive dimension of autonomy ensures an EU-dominant outcome in multiple instances of ‘interaction’ between EU and other standards.

From the *institutional* perspective, the Court emphasizes ‘the allocation of responsibilities defined in the Treaties *and, hence*, the autonomy of the [Union] legal order’ but adds that ‘respect for which must be assured by the Court of Justice’.³² At a general level, the Court aims to protect the ‘distribution of powers between the [Union] and the Member States’.³³ In Opinion 1/76, realizing the functional separation of the EU institutions from the Member States in the governance of an international agreement was paramount, achieved with a now familiar critique of ‘both a surrender of the independence of action of the Community in its external relations [*un abandon de l'autonomie d'action de la Communauté*’ in the French text] and a change in the internal constitution of the Community by the alteration of essential elements of the Community structure as regards both the prerogatives of the institutions and the position of the Member States *vis-à-vis* one another’.³⁴ Conversely, ‘where an agreement more clearly separates the [Union] from the other Contracting Parties from an institutional point of view and no longer affects either the exercise by the [Union] and its institutions of their powers by changing the nature of those powers, or the interpretation of [Union] law, the autonomy of the [Union] legal order can be considered to be secure’.³⁵

But the historically general expression of institutional autonomy is without question most strongly developed with respect to the *exclusive* jurisdiction of the Court to interpret EU law and thereby ensure the ‘observance’ of the ‘autonomy of the [Union] legal system’,³⁶ underpinned by references to Articles 19(1) TEU³⁷ and 344 TFEU.³⁸ That jurisdiction itself ‘form[s] part of the very foundations of the [Union]’.³⁹ Precisely ‘to ensure that the specific characteristics and the autonomy of that legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law’.⁴⁰

³¹ Opinion 1/91, supra note 2; Opinion 1/92 (EEA Agreement II), EU:C:1992:189.

³² Opinion 1/91, supra note 2, para. 35 (emphasis added). See also, *Kadi*, supra note XX, para. 282.

³³ Opinion 1/00, supra note 22, para. 5 (citing Opinion 1/91, supra note 2); see also, paras 30-46.

³⁴ Opinion 1/76, EU:C:1977:63, para. 12.

³⁵ Opinion 1/00, supra note 22, para. 6, citing Opinion 1/92 as an example.

³⁶ *Kadi*, supra note 4, para. 282.

³⁷ E.g. on the Court of Justice, Opinion 1/91, supra note 2, para. 35; on the role of national courts and tribunals, Opinion 2/13, supra note 6, para. 163. Article 19(1) TEU provides that the Court of Justice of the European Union ‘shall ensure that in the interpretation and application of the Treaties the law is observed. Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law’.

³⁸ E.g. Opinion 1/91, supra note 2, para. 35; Opinion 2/13, supra note 6, para. 201. Article 344 TFEU provides that Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein’.

³⁹ *Kadi*, supra note 4, para. 282.

⁴⁰ Opinion 2/13, supra note 6, para. 174; see also, *Achmea*, supra note 3, para. 35.

On paper, this is not an absolute barrier to interaction with other systems or with other mechanisms for the settlement of disputes. In other words, where an international agreement 'provid[es] for the creation of a court responsible for the interpretation of its provisions...such an agreement is not, *in principle*, incompatible with European Union law' since the 'competence of the European Union in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit itself to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions'.⁴¹ However, such an agreement may 'not change the essential character of the function of the Court as conceived in the EU and FEU Treaties'; this requires that 'the indispensable conditions for safeguarding the essential character of those powers are satisfied and, consequently, there is no adverse effect on the autonomy of the European Union legal order'.⁴²

In practical terms, this has come to mean that 'any action by the bodies given decision-making powers...as provided for in the agreement envisaged, must not have the effect of binding the EU and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of EU law'.⁴³ Where the Court of Justice is (required to be) involved, its determinations must be binding and not merely advisory.⁴⁴ Furthermore, Member States may not establish 'a mechanism for settling disputes...which would prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law, even though they might concern the interpretation or application of that law' or conclude a treaty by which they 'agree to remove from the jurisdiction of their own courts, and hence from the system of judicial remedies which the second subparagraph of Article 19(1) TEU requires them to establish in the fields covered by EU law...disputes which may concern the application or interpretation of EU law'.⁴⁵ Particular importance is conferred on the functioning and significance of the preliminary ruling procedure i.e. 'the task assigned to the Court of Justice under Article [267 TFEU], the object of which is to secure uniform interpretation of the Treaty by national

⁴¹ Opinion 1/09, supra note 5, para. 74 (emphasis added); see also e.g. Opinion 2/13, supra note 6, para. 182.

⁴² Opinion 1/09, supra note 5, paras 75-76; see also e.g. Opinion 2/13, supra note 6, para. 183. See generally, 'Editorial Comments: The EU's Accession to the ECHR - A "NO" from the ECJ!', 52:1 *Common Market Law Review* (2015) pp.1-16.

⁴³ Opinion 2/13, supra note 6, para. 184. Specifically on the question of EU accession to the ECHR, the Court confirmed that 'it should not be possible for the ECtHR to call into question the Court's findings in relation to the scope *ratione materiae* of EU law, for the purposes, in particular, of determining whether a Member State is bound by fundamental rights of the EU' (para. 186).

⁴⁴ Opinion 1/92, supra note 31, esp. para. 33.

⁴⁵ *Achmea*, supra note 3, paras 56 and 55 respectively. See also, Opinion 1/00, supra note 22, para. 17: 'disputes between the Member States, or between those States and the [Union] institutions, concerning interpretation of the rules of [Union] law...will continue to be dealt with exclusively by the machinery provided for by the Treaty'. Consider also the Court's refusal to recognise the direct effect of international norms e.g. Case C-308/06 *Intertanko*, EU:C:2008:312

courts and tribunals’.⁴⁶ Relatedly, the responsibilities but also the privileges of national courts and tribunals, to ensure their functioning as EU courts within that system, must be protected.⁴⁷

Overall, the trajectory of the autonomy of the EU legal order as one ‘separate from’ others can be seen to have moved quickly from concerns for independence or self-rule to the entrenchment of self-reference; the question then becoming, who, institutionally, has the power to determine the Union’s capacity for interaction with other systems and their standards. This leads not only, then, to the idea of the Union standing apart, but to the question of just how far apart it stands – and why.

3. The Nature of Autonomy: What Kind of Principle?

Merging together the purposive, substantive and institutional dimensions summarized above, what ‘is’ the resulting autonomy of EU law? In Section 3.1, the nature of autonomy as a principle of EU law, and more specifically as a ‘structural’ principle of EU law,⁴⁸ is outlined. In Section 3.2, the argument that autonomy is, additionally, an ‘existential’ principle of the Union is advanced.

3.1 A Principle of Union Law

As Section 2 demonstrates, the autonomy of EU law and/or of the EU legal order was constructed by knitting together a ‘body of principles’⁴⁹ drawn from ‘the specific characteristics arising from the very nature of EU law’.⁵⁰ However, it is also a general principle of EU law on its own terms, in the sense that, as the case law presented in Section 2 establishes, it meets the definition of ‘fundamental propositions of law which underlie a legal system and from which concrete rules or outcomes may be derived’.⁵¹ In that light, its constituent parts may not, individually, have defeated the particular method of EU accession to the ECHR assessed in Opinion 2/13; but the deployment of autonomy *as a principle* had precisely that effect. Conceiving of autonomy as a principle and not just as a way to describe a bundle of other legal norms does therefore have added (legal) value: there is a discernible sum that is greater than the individual parts.

⁴⁶ *Van Gend en Loos*, supra note 8, p.12. See also, Opinion 2/13, supra note 6, para. 176, describing the preliminary ruling procedure as the ‘keystone’ of the EU judicial system (see further, paras 198-199); see similarly, *Achmea*, supra note 3, para. 37.

⁴⁷ Opinion 1/09, supra note 5, para. 85; Case C-42/17 *MAS*, EU:C:2017:936, para. 22. See also, Case C-64/16 *Associação Sindical dos Juizes Portugueses*, EU:C:2018:117, paras 32-34.

⁴⁸ M Cremona (ed.), *Structural Principles in EU External Relations Law* (Hart Publishing, Oxford, 2018).

⁴⁹ M Dougan, ‘An Airbag for the Crash Test Dummies? EU-UK Negotiations for a Post-Withdrawal “Status Quo” Transitional Regime under Article 50 TEU’, 55:2/3 *Common Market Law Review* (2018) p.87.

⁵⁰ Opinion 2/13, supra note 6, para. 166.

⁵¹ T Tridimas, *The General Principles of EU Law* 2nd ed. (OUP, Oxford, 2006) p.1.

More particularly, Cremona's characterization of autonomy as a 'structural' principle of EU law compellingly illuminates the work that it performs within, and for, the EU legal order.⁵² Cremona first acknowledges the argument that trying to classify principles of Union law collapses into futility, that the 'value of a classification of general principles is limited'.⁵³ However, she then defends the 'increase [in] our understanding' that classification brings: it sheds light on 'the contribution to policy-making of each different actor (Member States as well as the institutions) and the balance and constructive relationships between them; their accountability to individuals and third countries affected by their decisions and the transparency that underpins that accountability'; of particular importance in EU external relations since 'the substantive content of that policy is left so undefined by EU Treaty law'.⁵⁴ This defence is strongly supported here since, as manifestations of EU primary law,⁵⁵ principles act as both 'positive' shapers of and 'negative' constraints on action undertaken by the EU institutions and by the Member States.

The autonomy of EU law is a particularly potent device of EU primary law and its unfolding character and implications 'entail important implications for a better understanding of the EU Treaties as the Union constitution'.⁵⁶ Moreover, while many general principles of EU law now also find expression in the EU Treaties, autonomy does not. The objective here is not so much to connect to debates about whether a hierarchy of primary law sources exists in the EU system,⁵⁷ but instead to argue that *extra-Treaty primary law* deserves especially close scrutiny. It is at the edges of EU law yet provides a frame around the whole enterprise. It can have extraordinary implications for choices made politically yet develops amorphously. Hillion's conception of an emerging 'Union membership law', including the 'quasi-primary law-making power' being exercised by the European Council in the Brexit negotiations, provides a perfect example of how a distinctive swathe of primary law can – still – evolve with simultaneously acute legal effects yet a vagueness around its grounding authority and detailed content.⁵⁸ Several analyses of Opinion 2/13 questioned the Court's privileging of the 'essential characteristics' of EU law, which are *not* expressed in the Treaties, over the protection of fundamental rights, expressed with some rhetorical vigor in several Treaty provisions.⁵⁹ In short: what is EU primary law, and who gets to say what it is?

⁵² M Cremona, 'Structural Principles and their Role in EU External Relations Law' in M Cremona (ed.), *supra* note 48, pp.3-29.

⁵³ *Ibid* p.15.

⁵⁴ *Ibid*.

⁵⁵ E.g. *Kadi*, *supra* note 4, para. 308; Joined Cases C- 402/07 and C- 432/07 *Sturgeon*, EU:C:2009:716, para. 48.

⁵⁶ Contartese, *supra* note 9, p.1637.

⁵⁷ Debates outlined by Contartese, *ibid*.

⁵⁸ C Hillion, 'Withdrawal under Article 50 TEU: An Integration-Friendly Process', 55:2/3 *Common Market Law Review* (2018), p.52.

⁵⁹ E.g. S Peers, 'The EU's Accession to the ECHR: The Dream Becomes a Nightmare', 16:1 *German Law Journal* (2015) p.221; Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue – Autonomy or

In the specific context of EU external relations, Cremona distinguishes ‘structural’ principles as those ‘drawn from the Treaties and elaborated by the Court’ to establish and protect ‘an institutional space within which policy may be formed, in which the different actors understand and work within their respective roles’.⁶⁰ They are structural ‘in the sense of defining and being inherent to the deep structure of the EU’;⁶¹ and they include sincere cooperation, conferral, institutional balance, solidarity, subsidiarity, and autonomy. Cremona argues that structural principles are ‘not concerned with the *substantive content* of policy, but rather with *process* and the *relationships* between the actors in those processes, and their normative content reflects this’.⁶² As observed in Section 2, the priority sought for EU fundamental rights standards – over and above the content of fundamental rights protection that might be distilled from external sources – in *Kadi* and Opinion 2/13 reflects precisely this idea. Azoulai adds an important safeguarding function of structural principles for the specific context of the Union: ‘[s]tructural principles are seen as forms of rationalisation of a *highly valuable but essentially instable* project. To make EU law subject to structural principles is to make it and the EU more resilient’.⁶³

Cremona further distinguishes ‘relational’ structural principles, which ‘govern the relationships between actors or legal subjects (not norms)’,⁶⁴ and ‘systemic’ structural principles, which are ‘concerned with the operation of the system as a whole, with building the EU’s identity as a coherent, effective and autonomous actor in the world’.⁶⁵ The autonomy of EU law falls in the latter category, alongside coherence and effectiveness; their systemic nature ‘implies that these principles serve to guide and shape the other [i.e. relational] structural principles and their implementation’.⁶⁶ However, Cremona draws an important distinction between thinking about principles in terms of any inherent *hierarchy* (‘the nature of principles is not to be hierarchic; they accommodate each other and a principle may be given more weight in one case than another’) and that understanding not ‘preclud[ing] the possibility that the Court appears to privilege certain principles over others’.⁶⁷ This insight about constructed more than inherent repercussions perfectly reflects the story of the autonomy of EU law, as will now be explained in further detail. However, the *extent* to which

Autarky?’, Jean Monnet Working Paper 01/15, <jeanmonnetprogram.org/paper/opinion-213-on-eu-accession-to-the-echr-and-judicial-dialogue-autonomy-or-autarky/>, visited on 24 May 2018, p.16.

⁶⁰ Cremona, *supra* note 52, p.5.

⁶¹ *Ibid* p.15.

⁶² *Ibid* p.12 (emphasis in original).

⁶³ L Azoulai ‘Structural Principles in EU Law: Internal and External’ in Cremona (ed.), *supra* note 48, p.33 (emphasis added).

⁶⁴ Cremona, *supra* note 52, p.17 (e.g. sincere cooperation, transparency, institutional balance, conferral).

⁶⁵ *Ibid* p. 18. See similarly, M Klamert, ‘The Autonomy of the EU (and of EU Law): Through the Kaleidoscope’, 42:6 *European Law Review* (2017) p.817, who describes autonomy as ‘a systemic or constitutional principle derived from the fundamental objectives of the EU legal system’.

⁶⁶ Cremona, *supra* note 52, p. 28.

⁶⁷ *Ibid* p. 14.

autonomy is privileged is also argued to distinguish it from other structural principles such as coherence and effectiveness.

3.2 An 'Existential' Principle of Union Law

Building further on the idea of autonomy as a systemic structural principle of Union law, in the sense that it contributes to the very creation of the EU legal order and not just to its functioning, it is argued here that autonomy also evidences a distinctive – and distinctively intense – quality of *existentialism*. Two interconnected reasons explain this claim: first, more briefly, the extent and consequences of its felt impact in both the internal and external spheres of the EU legal order; and, second, the constructed (rather than inherent) extent of *extremism* that the application of autonomy entails.

On the *internal/external* dimension, some principles of Union law have internal effect only or at least an external effect that is significantly more limited than the effect felt internally (e.g. primacy; direct effect). Others, such as the principle of sincere cooperation, have implications in both the internal and external spheres, evidencing a symbiotic link between the two domains.⁶⁸ There can also be a more competitively pragmatic dynamic between the internal and external spheres of EU law in pursuit of the overarching goal of autonomy: for example, de Witte discusses how recourse to external (especially ECHR) fundamental rights standards was a price paid by the Court of Justice to defend the autonomy of EU law against national fundamental rights standards.⁶⁹ In both senses, 'the substance of the autonomous EU legal order takes more concrete form precisely when it collides with national and/or international law'.⁷⁰ Thus, whether in synergy or opposition, the internal and the external are inextricably linked, recalling the paradox of autonomy with interdependency observed in Section 2.

However, the *extent* of the manifestation of the EU legal order that connects to the invocation of autonomy, in both the internal and external spheres of EU law, is arguably unparalleled. As principles tied to creating the identity of the EU as an actor, all of the structural principles of Union law can be said to have an existential *dimension*. But for autonomy, the language of the Court is strikingly non-negotiable – e.g. '[p]reservation of the autonomy of the [Union] legal order requires...that the essential character of the powers of the [Union] and its institutions as conceived in the Treaty *remain unaltered*'.⁷¹ This quality of extremity sets autonomy apart from other structural principles. That is how the idea of autonomy as an *existential principle* is used here. Examples of

⁶⁸ For example, this aspect of Opinion 1/76 (supra note 34) is discussed further by Contartese, supra note 9, p.1631. Cremona, supra note 52, distinguishes between internal and external effects of structural principles in some respects (pp.16-17); this point is returned to below.

⁶⁹ B de Witte, [reference to follow]; and e.g. Case 4/73 *Nold v Commission*, EU:C:1974:51.

⁷⁰ Editorial comments – Polar Exploration: Brexit and the Emerging Frontiers of EU Law', 55:1 *Common Market Law Review* (2018), p4.

⁷¹ Opinion 1/00, supra note 22, para. 12 (emphasis added).

extremity were noted briefly in Section 2 but will now be examined in more detail under three main themes: inevitability; non-derogability; and institutional concentration.

3.2.1 Inevitability

A strong theme of criticism of the conception of autonomy progressed by the Court is that the fundamentals of autonomy as self-rule neither inevitably nor inherently call for the extremity of ‘self-ness’ with which the autonomy of the EU legal order has come to be defined. A self-standing legal order does not have to exclude the influence of external sources or standards or (voluntary) submission to external institutions to the extent that the autonomy of EU law has been shaped to demand. In other words, this degree of extremity is a Court of Justice *choice*. Its singular commitment to autonomy morphed from securing self-rule to entrenching self-reference, a path that falls more steeply from ‘separate from’ to systemic isolation.

Fundamental rights protection provides a good example of the extremity of autonomy through paradox. In its substantive reasoning, the Court draws openly from the common constitutional traditions of the Member States to generate EU standards of protection,⁷² yet it precludes (sometimes even in the very same judgments) ‘recourse to the legal rules *or concepts* of national law’ when affirming the autonomy of the EU legal *system*.⁷³ Opinion 2/13 exemplifies the latter, suggesting an ‘absolute and maximalist vision of the impenetrability of EU and international law’.⁷⁴ The *Kadi* dilution of influences from the international legal order provides another example.⁷⁵ How is it that the Court can seem simultaneously to engage with yet also exclude external systems? Its concern for autonomy explains the contradiction. National constitutions make decisions about how a state can interact with systems that are both internal (e.g. devolution; federalism) and external to it. National constitutional or supreme courts then patrol the boundaries of systemic interaction. This can be compared to the task of the Court of Justice. However, national standards of rights protection tend to be evaluated in a substantive sense against the ‘floor’ established by international norms (as articulated by international courts), evidencing an (openness to the) interaction of systems in the practice of self-rule that is different from *Kadi* – there, establishing the priority of EU standards above international standards in a more formalistic way seemed decisive.⁷⁶ This does not mean that external standards will ‘win’ but it does shift outwards the terms of the assessment. The closedness of the

⁷² Case 11/70 *Internationale Handelsgesellschaft*, EU:C:1970:114, para. 4.

⁷³ *Ibid* para. 3 (emphasis added).

⁷⁴ N Jääskinen and A Sikora, ‘The Exclusive Jurisdiction of the Court of Justice of the European Union and the Unity of the EU Legal Order’ in M Cremona, A Thies, RA Wessel (eds.), *The European Union and International Dispute Settlement* (Hart Publishing, Oxford, 2017), p.106.

⁷⁵ E.g. G de Búrca, ‘The European Court of Justice and the International Legal Order After *Kadi*’, 51:1 *Harvard International Law Journal* (2010), pp. 1-49.

⁷⁶ See esp. *Kadi*, *supra* note 4, paras 306-308.

Court of Justice to external influences when the dispute is linked to autonomy contrasts markedly with the significance accorded to international law in the case law more generally,⁷⁷ underlining the disconnect between autonomy as a principle concerned with capacity for and operation of self-rule, on the one hand, and the inevitability of diminished interaction with other systems, on the other.

Similarly, the Court of Justice engages regularly with ECtHR case law. But when the context is broadened to contemplation of systemic autonomy, the drawbridge that links the two systems is retracted. While there are certainly questions about the effectiveness of the ECHR system in practice, it is at least a given that, in principle, a national standard found to contravene the Convention cannot persist – and the Convention, not national, standard is at the *centre* of that assessment. Crucially, the resulting imprint of the external system on the national standard – even at national constitutional level – is not then conflated with the demise of the national system. Opinion 2/94 was the Court's first consideration of accession to the ECHR. Its reasoning focused on the need for Treaty change, but the submissions had discussed the implications of accession for autonomy in light of the then recent Opinions on the EEA Agreement. Both the Commission and the European Parliament argued that accession to the ECHR was not incompatible with the autonomy of the EU legal order, with the Parliament's submission observing that '[e]xternal control in the field of human rights does not affect the autonomy of the [Union] legal order any more than it prejudices that of the Member States'.⁷⁸ Belgium, Austria, Denmark, Finland, Germany, Greece, Italy and Sweden argued along similar lines. But the Council as well as France, Portugal, Spain, Ireland and the UK did, in contrast, envisage an incompatibility between accession and autonomy because of the Court of Justice's 'monopoly of jurisdiction'.⁷⁹ By the time of Opinion 2/13, the Court's agreement-nullifying perspective on accession and autonomy stood in complete isolation from all 24 Member State submissions, as well as those of the Commission, Council and European Parliament, and the view of AG Kokott.⁸⁰ For the Court, *nothing* was more important than the autonomy of EU law; for all other EU actors, submitting to external scrutiny for the purposes of enriching fundamental rights protection was, in fact, more important.

⁷⁷ E.g. Case C-104/16 P *Council v Front Polisario*, EU:2016:973; Case C-266/16 *Western Sahara Campaign UK*, EU:C:2018:118.

⁷⁸ Opinion 2/94, EU:C:1996:140, [1996] ECR I-1763, p.1777; see similarly, the submission of the Commission: 'The Convention imposes only minimum standards. The control machinery has no direct effect in the Community legal order. Since it has not been considered contrary to the constitutional principles of the Member States, that machinery could hardly be considered to be incompatible with the principles of Community law' (ibid).

⁷⁹ Ibid p. 1769.

⁸⁰ View of AG Kokott in Opinion 2/13, EU:C:2014:2475.

By choosing extremity, the Court reduces the *responsibility* of the Union in the sense of being accountable to the outside;⁸¹ it fails to convey an institutional maturity that can comfortably accommodate and project the virtue of constitutional *humility*; and it eschews an approach to systemic interaction based more on pragmatic *flexibility*.⁸² In contrast, reflecting the reality of interconnectedness, in legal as well as other senses, and echoing the vast majority of related commentary, Advocate General Jääskinen has called for a more ‘prudent attitude [to] be adopted’ since ‘it increasingly often appears difficult for the Court to guarantee observance of the international obligations incumbent on the European Union whilst also preserving the autonomy of EU law’.⁸³ Otherwise, the critical balance identified by Contartese – i.e. balancing ‘the principle that EU international agreements must comply with the EU treaties (Art. 218(11) TFEU) with the fact that the Union enters into agreements which require changes to EU law (Art. 216(2) TFEU)’⁸⁴ – is out of kilter; successfully realizing the ‘in principle’ prospect provided for in Opinions 1/91 and 1/92 becomes elusive. The constraints developed around the capacity for and legitimacy of interaction end up, in real terms, defeating the possibility of interaction in the first place.⁸⁵ A counterpoint to the inevitability of extremity was recognised in the Belgian Government’s submission in Opinion 2/94, in the argument that the autonomy of the EU legal order was already ‘relative’ because of the practice of the Court of Justice in taking ECtHR judgments into account.⁸⁶ Relative autonomy, in various conceptions, is also widely advocated in the academic literature.⁸⁷ In particular, the idea of relativity is used to describe

⁸¹ On the theme of responsibility as accountability in international law, see the contribution to this volume by J Klabbers [reference to follow]. On the specific point that the Court of Justice ‘has not digested the idea of external control, and sees it as a threat rather than an opportunity’, see Eeckhout, *supra* note 59, p.39.

⁸² Contrasting the more pragmatic approach of AG Wathelet in *Achmea*, EU:C:2017:699, with the judgment of the Court, see the contribution to this volume by P Koutrakos [reference to follow].

⁸³ AG Jääskinen in Joined Cases C- 401/12 P to C- 403/12 P *Council v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*, EU:C:2014:310, paras 36 and 71 of the Opinion, using the example of environmental law as ‘an area in which the law is being drawn up and applied in an increasing number of locations, which necessarily entails instances of the interaction, internationalisation and even globalisation of that law. This multi-layered legal context requires, in my view, the adoption of a nuanced approach’ (para. 71 of the Opinion).

⁸⁴ Contartese, *supra* note 9, p.1636.

⁸⁵ Contartese qualifies the outcome in Opinion 1/00 in this respect; it remains ‘as yet the only case amongst those on the external dimension of autonomy where a draft agreement was declared compatible with the EU Treaties without modifications being necessary’ but also, the contested agreement remains ‘the only agreement amongst those assessed within the ECJ’s Opinions that does not foresee the establishment of an international court or tribunal or accession to one’ since dispute resolution was to be managed via a Joint Committee (*ibid* pp.1636-1637).

⁸⁶ Opinion 2/94, *supra* note 79, p.1778; in its view, what it called ‘absolute autonomy of the [Union] legal order in the field of the rights and liberties guaranteed by the Convention is not desirable’.

⁸⁷ E.g. challenging conceptions of ‘absolute’ autonomy, J Odermatt, ‘The Principle of Autonomy: An Adolescent Disease of EU External Relations Law?’ in Cremona (ed.) *supra* note 48, pp.291-316; distinguishing between ‘discursive’ and ‘exclusive’ autonomy, B Pirker and S Reitemeyer, ‘Between Discursive and Exclusive autonomy – Opinion 2/13, the Protection of Fundamental Rights and the Autonomy of EU Law’, 17 *Cambridge Yearbook of European Legal Studies* (2015) pp.168-188.

how autonomous systems, including national systems, voluntarily submit to ‘outside’ systems – not least, ironically enough, through the act of EU membership itself.

It should be noted that, in *Achmea*, the submissions of the Commission as well as several of the Member States did come closer to the understanding of autonomy applied by the Court, premised in particular on the perceived systemic risks that bilateral investment treaties between Member States pose to the underpinning principle of mutual trust. These more mixed perspectives on the reach of autonomy when compared to the unanimous submissions received for Opinion 2/13 does suggest a particular concern among EU actors, broadly understood, for enhanced protection of fundamental rights. For present purposes, however, whether the extremity of autonomy applied by the Court both within and outwith the context of fundamental rights is agreed with or not agreed with is one thing; that such extremity is produced in reality but is not inevitable is the central point. The character of autonomy as an existential principle of EU law lies more in its construction by the Court than any inherent requirements of establishing or sustaining a capacity for self-rule. Azoulai’s reminder of the comparative contestability of the EU system is, however, worth recalling in terms of trying to understand why things developed as they have.

3.2.1 Non-derogability

The second vector of existential extremity is captured by Dougan’s reference to autonomy ‘act[ing] as *non-derogable* constitutional limits to the exercise of EU external competences, designed to insulate the internal functioning of the Union’s institutional and legal system from any degree of external interference or influence’.⁸⁸ In this sense, the conditions necessary to shield the autonomy of EU law from incursion are described by the Court as ‘indispensable’.⁸⁹ Hardly any rule or principle of EU law is non-derogable, which makes autonomy stand out with respect to the extent to which this has been achieved in practice. Contartese observes that it ‘should be possible to clearly distinguish between what is “essential”, from which no derogations are allowed, and what is not, and therefore open to external influences’; similarly, she argues that ‘a further aspect of autonomy to be identified should lie in its limits’ but also that ‘[i]t is in the (current) impossibility to detect its limits that the ECJ’s case law reveals its ambiguity’.⁹⁰ This ‘ambiguity’ around the limits of autonomy reflects precisely, it is

⁸⁸ Dougan, *supra* note 49, p.87 (emphasis added). Again, the ‘insulation’ produced when autonomy is brought into the discussion should be distinguished from the interaction of the systems of EU, national and international law more generally.

⁸⁹ Opinion 2/13, *supra* note 6, para. 183.

⁹⁰ Contartese, *supra* note 9, p.1671.

suggested here, the non-derogable character of the principle compared to other principles, including other structural principles, of Union law.⁹¹

More specifically, because the very existence of the Union is deemed to be vulnerable when autonomy is mobilized, compromise is neither logical nor viable. Linking back to the ‘adverse effect’ standard of breach outlined in Section 2, Krenn is deeply critical of how ‘overly protective’ the Court is in the face of what could be conceived as ‘minor and immaterial threats’.⁹² However, in a context of existentialism, all threats are collapsed together in terms of potential risk. This point can be illustrated by the failure of autonomy to surface in a less extreme way across more areas of EU law. For example, in *Rottmann*, AG Poiares Maduro suggested that EU citizenship, since it ‘forms the basis of a new political area from which rights and duties emerge, which are laid down by [Union] law and do not depend on the State...in turn, legitimises the autonomy and authority of the [Union] legal order’.⁹³ But this idea was never really picked up in subsequent case law. On the contrary, the decisions built upon *Rottmann*, which draw rights directly from Article 20 TFEU where no cross-border element characterises the facts of the case, proceeds on the more exceptional basis that only the loss of EU citizenship altogether or forced departure from the territory of the Union as a whole will suffice to trigger supranational protection – certainly not ‘minor and immaterial threats’.⁹⁴ However, the sustainability of the non-derogability of autonomy and the constraints placed on the EU’s capacity for compromise as a result are returned to in Section 4 below in the context of Brexit.

3.2.3 Institutional Concentration

The extent of *institutional concentration* on protecting the jurisdiction of the Court of Justice – noting, conversely, the range of external dispute settlement mechanisms that autonomy almost always then defeats – is a strong exemplar of extremity, leading to depictions of the ‘selfishness’⁹⁵ or ‘fearfulness’⁹⁶ of the Court. The criticism is that the Court has fixated on even perceived risks to its own authority notwithstanding the consequences of its constructed version of autonomy for the capacity of other EU actors to commit to external mechanisms, constraining in turn their capacity to interact

⁹¹ The non-derogability of the primacy of EU law, theoretically at least, should be noted here; but primacy is distinguished from autonomy in other respects below.

⁹² C Krenn, ‘Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession after Opinion 2/13’, 16:1 *German Law Journal* (2015) pp.147-148.

⁹³ AG Poiares Maduro in Case C-135/08 *Rottmann*, EU:C:2009:508, para. 23 of the Opinion.

⁹⁴ E.g. Case C-40/11 *Iida*, EU:C:2012:691, esp. para. 71.

⁹⁵ B de Witte, ‘A Selfish Court? The Court of Justice and the Design of International Dispute Settlement beyond the European Union’ in M Cremona and A Thies (eds.), *The European Court of Justice and External Relations Law: Constitutional Challenges* (Hart Publishing, Oxford, 2014) pp.33-46. See also, D Kochenov, ‘EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?’, 34:1 *Yearbook of European Law* (2015) pp.74-96.

⁹⁶ E Spaventa, ‘A Very Fearful Court? The Protection of Fundamental Rights in the EU after Opinion 2/13’, 22:1 *Maastricht Journal of European and Comparative Law* (2015) pp.35-56.

meaningfully with the wider world. For example, Eckes remarks that '[u]ltimately, the different purposes of external autonomy melt into the main objective: to protect the monopolist position of the [Court] as the final arbiter not only of the relation between EU law and international law, but also of all relations within the EU legal order'.⁹⁷ Some leeway is extended to the Court in light of the foreseeability of the autonomy case law, including Opinion 2/13, because of the consistency of the narrative from *Van Gen den Loos* and *Costa v ENEL* onwards.⁹⁸ But foreseeability is not the same thing as inevitability, as discussed above. Emphasizing instead the purposive dimension, autonomy as service rather than selfishness is pointed to by Odermatt, observing that 'the Court's protection of its judicial monopoly is a means by which to preserve...autonomy, and is not only motivated by a need to preserve its own prerogatives and powers'.⁹⁹ As seen in Section 2, the Court has sought also to protect the functions of national courts within the composite EU judicial system.¹⁰⁰ Contartese is therefore right to caution that 'it would be reductive to narrow down the case law on autonomy to a sort of fortress behind which the ECJ defends itself from all other international jurisdictions'.¹⁰¹

Nevertheless, there is the sticky sense that all roads on questions of both jurisdiction and substance lead back to the Court of Justice anyway, cushioned by Article 19(1) TEU. Thus, while the Court characterized autonomy in terms of protecting against adverse effects on the allocation of responsibilities defined in the Treaties in Opinion 1/91, it did then emphasise its own competence both to articulate and to assure respect for that definition. The power to control external interaction is therefore highly concentrated on the Court – to date at least, as returned to in Section 4 below.

3.2.4 Existentialism beyond Autonomy?

The three coordinates of extremity outlined above – inevitability; non-derogability; and institutional coordination – collectively construct the idea of autonomy as an *existential principle* of EU law. In line with Cremona's expected attributes of a structural principle of Union law, autonomy subdues both

⁹⁷ C Eckes, 'International Rulings and the EU Legal Order: Autonomy as Legitimacy?' CLEER Papers 2016/2, <www.asser.nl/media/3002/cleer16-2_complete_web.pdf>, visited on 24 May 2018, p.12.

⁹⁸ D Halberstam, "'It's the Autonomy, Stupid!'" A Modest Defense of Opinion 2/13 on EU Accession to the European Convention on Human Rights', 16:1 *German Law Journal* (2015) pp.105-146. See similarly, J Odermatt, 'When a Fence Becomes a Cage: The Principle of Autonomy in EU External Relations Law' (2016/07) EUI MWP, <cadmus.eui.eu/bitstream/handle/1814/41046/MWP_2016_07.pdf?sequence=1>, visited on 24 May 2018, p.16. On the potential for a problematic ripple effect of an alternative outcome in Opinion 2/13, opening up space for national courts also to assert their claims about the nature and source of authority of EU law and in turn 'undermin[ing] the monopoly of legal interpretation of the [Court of Justice] over EU law', see Eckes, *supra* note 97, pp.19-21 and 30.

⁹⁹ J Odermatt, *supra* note 98, p.5. See further, p.10.

¹⁰⁰ See again, Opinion 1/09, *supra* note 5, and *Achmea*, *supra* note 3.

¹⁰¹ Contartese, *supra* note 9, p.1669, continuing that '[a]utonomy has, in fact, been applied to protect the powers of the other [Union] institutions (Opinion 1/76), the relationship amongst EU Member States (Opinion 1/76 and Opinion 2/13), the respect for the division of competence between the EU and its Member States (Opinion 1/91 and Opinion 2/13), and the role of the EU Member States' national courts (Opinion 1/09)'.

the *substantive* and the *purposive* by prioritizing the edifice of the EU legal order on its own, more abstract terms. But autonomy is employed at a level of extremity not readily shared by principles of Union law more generally. Autonomy is animated not by ‘puzzle to be worked out’ but by ‘threat’ as well as by perception of threat. It is, in effect, non-negotiable: a non-derogable legal red line. It equates reductions in the self-referential character of the EU legal system not just with a kind of subjugation – even through choice and/or for very good reason – but with existential wipeout.

Brexit probes qualities in a particularly acute way at present: it makes the existential threat feel distinctly real, for one thing; and, in consequence, we see a shift away from institutional concentration on the jurisdiction of the Court and a dilution of the tinge of desperation that such concentration has sometimes emitted. Brexit brings the *scale* of the threat into sharper relief, making it feel more genuinely existential. At the time of writing, the deeply frustrating state of negotiations reveals the difference in reality between political red lines, largely on the UK side, and legal red lines, which shape EU positions.¹⁰² These points are developed in Section 4 below. But first, a final question about existential principles of Union law: do *others* exist beyond autonomy?

As suggested earlier, principles such as institutional balance, coherence or transparency lack the qualities of extremity discussed here, especially with respect to non-derogability. More specifically, it seems unlikely that the Court would ‘go to the wire’ in their protection. My intuition is that only the principle of *unity* of the EU legal order comes closest to the existential principle threshold. It shares two important features with autonomy. First, the unity of the EU legal order has had both internal and external effects. In that respect, there is also the suggestion of both the symbiotic and competitive qualities discussed above for autonomy.¹⁰³ As mentioned in Section 3.1, and in fact using unity as the example, Cremona distinguishes how structural principles acquire shape in their internal and external contexts. She suggests that ‘[s]tructural principles in the internal context may be concerned primarily with the structure that it is the Union’s mission to build’ (e.g. ‘unity of the market’ or of the ‘internal space within which freedom of movement may take place’) while unity in the external context ‘, in contrast, ‘insofar as the EU has a mission to construct...is to construct the EU itself as an effective external actor. Thus, for example, unity becomes a question of the unity of the international representation of the Union and its Member States’.¹⁰⁴ But perhaps the distinction is not significant for present purposes, considering that the external context concern ‘with the articulation

¹⁰² Equating rather than distinguishing the two, e.g. European Union Committee, ‘UK-EU relations after Brexit’, 17th Report of Session 2017–19, <<https://publications.parliament.uk/pa/ld201719/ldselect/ldEUcom/149/149.pdf>>, visited on 26 June 2018.

¹⁰³ For a different view, merging ‘concern for the unity of the EU legal order’ with ‘the basic rationale behind the concept of autonomy’, see JW van Rossem, ‘The Autonomy of EU Law: More is Less?’ in RA Wessel and S Blockmans (eds.), *Between Autonomy and Dependence: The EU Legal Order under the Influence of International Organisations* (TMC Asser Press, The Hague, 2013) p.19.

¹⁰⁴ Cremona, *supra* note 52, pp.16-17.

of power of the EU's constituent parts (including the Member States...)'¹⁰⁵ also resonates with the role of the Court in the internal domain, especially thinking back to the annunciation of direct effect in the context of the effectiveness of the EU customs union. In any case, for present purposes, it is the very fact that concrete boundaries around the EU's capacity *to act* both internally *and* externally are induced by the principle of unity – in distinction from primacy and direct effect, the principles typically associated with the 'essential characteristics' of Union law alongside autonomy. Primacy does have a more non-derogable edge than direct effect, but it concerns effects conferred *after* EU action is taken in the form of a conflict of laws rule.

Second, sharing the purposive origin of autonomy outlined in Section 2, impairment of the 'unity and efficacy' of EU law has been described by the Court as a rule that is 'fundamental to the *existence* of the [Union]'.¹⁰⁶ However, while the principles that tend to be cited most frequently alongside the unity of EU law – coherence and effectiveness – are profoundly important to the optimal functioning of the Union, incoherent or ineffective EU law does not tend to have existential implications. For example, harmonized corporate taxation might induce a more coherent and effective internal market, but its absence does not negate the internal market. Coherence and effectiveness are outcome-oriented principles that are situation-variable, or at least situation-dependent. They achieve something *within* the Union. In contrast, the principles of autonomy and unity are (also) invoked to *constitute* it – to make it (continue to) exist.

There are critical questions that need to be unpacked further in trying to understand the nature of unity more deeply; for example, about the extent of overlap (or otherwise) between unity and the *uniformity* of EU law.¹⁰⁷ However, a hesitation in characterizing unity as an existential principle stems from the pragmatism that the Court has shown in accepting less rigid and therefore less extreme manifestations of the unity of the EU legal order – most strikingly in connection with extra-Treaty solutions developed in the context of the Eurozone crisis.¹⁰⁸ At a general level, the extent to which *differentiated integration* represents *disintegration* is an important theme in current thinking

¹⁰⁵ Ibid p.17.

¹⁰⁶ *Commission v Belgium*, supra note 7, para. 19 (emphasis added).

¹⁰⁷ E.g. consider the English ('to ensure that the specific characteristics and the autonomy of the EU legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and *uniformity* in the interpretation of EU law') and French ('la cohérence et l'*unité*') versions of *Achmea*, supra note 3, para. 35 (emphasis added). The expression is translated into English (also from French) as 'coherence and unity' in the Opinion of AG Wathelet, supra note 82, para. 234 of the Opinion. See generally, Jääskinen and Sikora, supra note 74, pp.101-112.

¹⁰⁸ See esp. Case C-370/12 *Pringle*, EU:C:2012:756. See e.g. Azoulai, supra note 63, p.39: '[w]hat is particularly striking is the ease with which the Court accepts the use of the EU institutions in a context which is profoundly adverse to the development of the legal and institutional culture of the EU'. See further, B de Witte and T Beukers, 'The Court of Justice Approves the Creation of the European Stability Mechanism outside the EU Legal Order: *Pringle*', 50:3 *Common Market Law Review* (2013) pp.845-846.

about the capacity of the Union legal order to tolerate and make provision for difference.¹⁰⁹ However, if the balance between integration and difference achieved to date is perceived to veer in the wrong direction, the Court's recourse to the unity of the EU legal order could ignite more definitively – more *extremely* – than we have yet seen. Azoulai perfectly expresses the central dilemma – 'whether the Court will be able to solve the conundrum of providing for the unity of a non-unitary polity' – and this is a question that is going to grow sharper edges.¹¹⁰ Unity may, then, be thought of as an existential principle in waiting. But the converse conclusion for now is that autonomy does not, yet, share the existential principle stage.

4. Brexit and the Generalization of Autonomy

Almost all case law on the autonomy of EU law to date has ultimately concerned the compatibility of dispute settlement mechanisms external to the EU legal order with the 'essential characteristics' of the Union and of EU law, with a related dominant concern for the authority of the Court of Justice (both directly and indirectly). However, as seen in Section 2, the roots of autonomy were always connected to a more general perspective – 'the allocation of responsibilities defined in the Treaties *and, hence, the autonomy of the [Union] legal order*'¹¹¹ – as engaged with in Opinion 1/76. The process of negotiating Brexit brings back to the forefront this more general institutional dimension through the emphasis being placed on autonomy of *Union decision-making*. Of course, boundaries generated by autonomy as it relates to protecting the jurisdiction of the Court will continue to constrain what can be agreed to, on the EU part, in the expected Withdrawal Agreement between the EU and the UK (including arrangements for transition) and also in the agreement(s) determining the future relationship between the EU and the UK.¹¹² However, the Union decision-making aspect of the Brexit

¹⁰⁹ See European Commission, White Paper on the Future of Europe – Reflections and scenarios for the EU27 by 2025, COM(2017) 2025; B de Witte, 'An Undivided Union? Differentiated Integration in Post-Brexit Times', 55:2/3 *Common Market Law Review* (2018) pp. 227–249; and D Thym, 'Competing Models for Understanding Differentiated Integration' in B de Witte, A Ott and E Vos (eds.), *Between Flexibility and Disintegration – The Trajectory of Differentiation in EU Law* (Edward Elgar, Cheltenham, 2017) pp.28-75.

¹¹⁰ L Azoulai 'The Many Visions of Europe: Insights from the Reasoning of the European Court of Justice in External Relations Law' in Cremona and Thies (eds.), *supra* note 95, p.182.

¹¹¹ Opinion 1/91, *supra* note 2, para. 29 (emphasis added).

¹¹² For example, as discussed by Eckes in a general rather than Brexit-specific sense, dispute settlement that relates to complaints received by individuals, and not just states, has specific Brexit relevance, not least in connection with the citizens' rights part of the expected Withdrawal Agreement (Eckes, *supra* note 97, p.15). See, at the time of writing, European Commission, Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community – TF50 (2018) 35 – Commission to EU27, 19 March 2018, <ec.europa.eu/commission/sites/beta-political/files/draft_agreement_coloured.pdf>, visited on 24 May 2018. Note, for example, the proposal for time limited access to the preliminary rulings procedure under Article 151 of the Draft Agreement. See further, European Commission, Communication from the Commission to the European Council (Article 50) on the state of progress of the negotiations with the United Kingdom under Article 50 of the Treaty on European Union, COM(2017) 784 final, 8 December 2017, pp.14-15.

negotiation framework generates a seam of autonomy impact beyond the Court and evidences, for really the first time, more conscious engagement by the political institutions with the process of reflecting on and articulating the *essential* characteristics of the Union and of its legal order.¹¹³

It is interesting that what became the principle of indivisibility of the single market was already evident ('acceptance of all four freedoms') in the statement issued on 29 June 2016 by the EU27 as well as the Presidents of the European Council and the European Commission, in the immediate aftermath of the referendum result in the UK.¹¹⁴ But in terms of what the Union 'is', there was more a sense of uncertainty.¹¹⁵ However, one year later, confidence was restored. In its April 2017 Article 50 Guidelines, the European Council articulated the 'Core Principles' that 'define the framework for negotiations under Article 50 TEU'; and it included there, and from the outset, the commitment that '[t]he Union will preserve its autonomy as regards its decision-making *as well as* the role of the Court of Justice of the European Union'.¹¹⁶

The Council Decision agreeing Directives for the negotiation of a withdrawal agreement adopted the dual autonomy conception envisaged by the European Council: that it requires protection of the jurisdiction of the Court of Justice with respect to 'effective enforcement and dispute settlement mechanisms'; but that is also requires protection of the Union's 'institutional structure' more broadly.¹¹⁷ This generalization is captured in the much-repeated expression that autonomy of

¹¹³ Cf. the more efficiency-driven understanding of the autonomy of Union decision-making in an address given by Commissioner de Clercq at the EEC/EFTA ministerial meeting at Interlaken on 20 May 1987, <http://europa.eu/rapid/press-release_SPEECH-87-32_en.htm>, visited on 26 June 2018, p6. I am grateful to Marise Cremona for this reference.

¹¹⁴ Informal meeting at 27 Brussels, 29 June 2016 Statement, <www.consilium.europa.eu/media/20462/sn00060-en16.pdf>, visited on 24 May 2018, para. 4.

¹¹⁵ 'The European Union is a historic achievement of peace, prosperity and security on the European continent and remains our common framework. At the same time many people express dissatisfaction with the current state of affairs, be it at the European or national level. Europeans expect us to do better when it comes to providing security, jobs and growth, as well as hope for a better future. We need to deliver on this, in a way that unites us, not least in the interest of the young. This is why we are starting today a political reflection to give an impulse to further reforms, in line with our Strategic Agenda, and to the development of the EU with 27 Member States' (ibid, paras 6-7).

¹¹⁶ European Council (Article 50) guidelines on Brexit negotiations, 29 April 2017, <www.consilium.europa.eu/en/press/press-releases/2017/04/29/euco-brexit-guidelines/>, visited on 24 May 2018, para. 1 (emphasis added). The European Parliament had already referenced both the 'decision-making capacity and autonomy of the Union' (para. 22) and the role of the Court of Justice (para. 28) earlier in the same month; see European Parliament resolution of 5 April 2017 on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union (2017/2593(RSP)), 5 April 2017, <www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0102+0+DOC+XML+V0//EN>, visited on 24 May 2018.

¹¹⁷ Council, Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union, XT 21016/17, 22 May 2017, <www.consilium.europa.eu/media/21766/directives-for-the-negotiation-xt21016-ad01re02en17.pdf>, visited on 24 May 2018, paras 17 and 39.

the Union and of its legal order *includes* the role of the Court of Justice.¹¹⁸ The structural nature of autonomy, from the perspective of the political institutions, is further evidenced by the fact that autonomy tended not to be referenced in more detailed/substantive Brexit papers¹¹⁹ but was instead used, repeatedly, to frame and underpin more overarching negotiation mandates. However, as negotiations progress, legal constraints fixed by the autonomy of Union decision-making are now referenced more often in substantive papers too.¹²⁰ That makes sense in the context of the more urgent need to think about ensuring the effectiveness of what will be agreed to in the expected Withdrawal Agreement, in the first instance, through mechanisms to monitor compliance of the commitments entered into (and not just to settle disputes where things go awry in future practice).

However, the most striking manifestation of the autonomy of Union decision-making at the time of writing concerns the stark statements codified in the Draft Withdrawal Agreement published in March 2018. Following indications communicated by the European Parliament,¹²¹ the Commission¹²², and the Council,¹²³ Article 6(1) of the Draft Agreement provides:

For the purposes of this Agreement, all references to Member States and competent authorities of Member States in provisions of Union law made applicable by this Agreement shall be read as including the United Kingdom and its competent authorities, except as regards:

¹¹⁸ E.g. European Commission, Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU, Position paper transmitted to EU27 on Governance, TF50 (2017) 4 – Commission to EU 27, 28 June 2017, <ec.europa.eu/commission/sites/beta-political/files/essential_principles_governance_0.pdf>, visited on 24 May 2018. See further, slides dated 19 January 2018 on ‘Governance’, <ec.europa.eu/commission/sites/beta-political/files/governance.pdf>, visited on 24 May 2018; European Commission, *supra* note XX [regulatory]; and European Parliament resolution of 14 March 2018 on the framework of the future EU- UK relationship (2018/2573(RSP)), <www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2018-0069+0+DOC+XML+V0//EN&language=EN>, visited on 24 May 2018, esp. paras 4, 14, 39, and 41-42.

¹¹⁹ E.g. it was not referenced in any of the ‘Joint Technical Notes’ that outline the progress of negotiations on citizens’ rights.

¹²⁰ E.g. European Commission, Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU, slides on 29 January 2018 on ‘police and judicial cooperation in criminal matters’, <ec.europa.eu/commission/sites/beta-political/files/police_judicial_cooperation_in_criminal_matters_0.pdf>, visited on 24 May 2018.

¹²¹ European Parliament resolution of 13 December 2017 on the state of play of negotiations with the United Kingdom (2017/2964(RSP)), 13 December 2017, <www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONGML+TA+P8-TA-2017-0490+0+DOC+PDF+V0//EN>, visited on 24 May 2018, para. 12.

¹²² European Commission, Annex to the Recommendation for a Council Decision supplementing the Council Decision of 22 May 2017 authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for an agreement setting out the arrangements for its withdrawal from the European Union, COM(2017) 830 final, para. 17.

¹²³ Council, Annex to the Council Decision supplementing the Council Decision of 22 May 2017 authorising the opening of the negotiations with the United Kingdom of Great Britain and Northern Ireland for an agreement setting out the arrangements for its withdrawal from the European Union – Supplementary directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union, 29 January 2018, <www.consilium.europa.eu/media/32507/xt21004en18.pdf>, visited on 24 May 2018, para. 18.

- (a) the nomination, appointment or election of members of the institutions, bodies, offices and agencies of the Union, as well as the participation in the decision-making and the attendance in the meetings of the institutions;
- (b) the participation in the decision-making and governance of the bodies, offices and agencies of the Union;
- (c) the attendance in the meetings of the committees referred to in Article 3(2) of Regulation (EU) No 182/2011 of the European Parliament and of the Council⁴, of Commission expert groups or of other similar entities, or in the meetings of expert groups or similar entities of bodies, offices and agencies of the Union, unless otherwise provided in this Agreement.

The extent of the exclusion of the UK from Union decision-making that Article 6(1) seeks to achieve contrasts strongly with the effects that such decision-making will continue to have after the UK's withdrawal from the Union, since Article 126 of the Draft Agreement confirms that '[d]uring the transition period, the institutions, bodies, offices and agencies of the Union shall have the powers conferred upon them by Union law in relation to the United Kingdom and natural and legal persons residing or established in the United Kingdom' and that '[i]n particular, the Court of Justice of the European Union shall have jurisdiction as provided for in the Treaties'. There is a sense of extremity here not reflected in the decision-forming participation extended under, for example, the EEA framework. The expectation that decisions made by the Union *autonomously* will apply to the UK as a non-member state is a complex constitutional twist; when read together with the hard lines expressed in Article 6(1) of the Draft Agreement, it raises questions about the extent to which the fundamentals of EU law – and the legal basis of Article 50 TEU more specifically¹²⁴ – can comfortably accommodate the 'specialness' of the Union being extended externally to this extent.¹²⁵

However, from the perspective of trying to understand what autonomy 'is', the implications of the autonomy of Union decision-making that constrains what the EU can concede in Brexit negotiations confirm precisely, even archetypically, the existential quality of the principle suggested in this article: for if being out of the Union was just like being in it, not least from an institutional perspective, what would be the point of the Union's existence at all? The degree to which the UK is envisaged as being excluded from Union decision-making reflects an extreme choice. Here too, in synchronicity with the autonomy of EU law developed so far in the case law, the uniqueness of the bond that is considered to result from the mutual trust shared by EU Member States prevails. But through the Brexit process, the political institutions evolve beyond passive responders to the Court's conception of autonomy and become active in deciding both what the 'essential characteristics' of the Union and of EU law actually are, and how far those characteristics should legally constrain political

¹²⁴ On these questions in the context of transition but with wider implications, see Dougan, *supra* note 49, pp.91-95

¹²⁵ For different perspectives on some of these questions, cf. Hillion, *supra* note 58, and Dougan, *supra* note 49.

choices that *all* EU actors might make. Through inevitable challenges to the extremity of its application that we are likely to see as negotiations advance, Brexit will, in turn, determine whether autonomy remains ‘the’ existential principle of Union law or not.

5. Conclusion

This article has argued that the autonomy of EU law and of the EU legal order is a very particular, to date unique, structural principle of Union law. This characterization is drawn primarily from its conception in the case law of the Court of Justice and sits within a broader examination of EU primary law and especially the manufacturing process for extra-Treaty primary law. As well as generating effects felt in both the internal and external spheres of EU law, autonomy is distinguished from other principles by a quality of extremity. It has become ‘the’ existential principle of Union law, overshadowing other structural principles that may well have existential dimensions but concern for which has not produced a constraining of the capacity of EU actors to interact with other systems to anything like the same extent. Opinion 2/13 demonstrates that it is not enough for the Treaty to compel an action (accession to the ECHR). While Article 218(11) TFEU provides for the revision of the Treaties, it would now seem that the more ‘drastic solution’¹²⁶ of a Treaty amendment *contradicting* the Opinion of the Court (rather than, after Opinion 2/94, accommodating it) is needed to ensure a legally meaningful accession that enables genuine external supervision of EU action and standards. It is impossible to imagine how such an action would not realize another Brexit-familiar formula – a constitutional crisis – since it would amount to diminution of the consistently reaffirmed ‘essential characteristics’ of *Union law*, which constitute ‘the very foundations’ of the existence of *the Union*.

It was also shown that (re-)animation of the autonomy of Union decision-making as a ‘core principle’ framing Article 50 TEU negotiations both generalizes autonomy as a legal principle and confirms the essence of its existential character. But Brexit is a political challenge the logistical complexity of which makes accession to the ECHR pale in comparative significance. Will the legal boundaries fixed by autonomy at this stage of the Brexit process continue to exert the extreme, non-derogable quality of autonomy developed in the case law of the Court?¹²⁷ If they do, the existential extremity of autonomy is reinforced. But the contestability of the Union then becomes entrenched rather than conquered, as do the apparently novel attributes of EU standards above any others.

¹²⁶ Contartese, *supra* note 9, p1670.

¹²⁷ At the time of writing, that tone does remain evident; see e.g. Michel Barnier’s speech at the XXVIIIth FIDE congress, 26th May 2018, <europa.eu/rapid/press-release_SPEECH-18-3962_fr.htm>, visited on 28 May 2018: ‘*Et surtout il serait contraire aux intérêts de nos entreprises d’abandonner notre autonomie de décision. Cette autonomie nous permet de poser des normes pour l’ensemble de l’UE mais aussi souvent de voir ces normes reprises dans le monde entier...Et nous ne pouvons, nous ne pourrions pas partager cette autonomie décisionnelle avec un pays tiers, sans doute un ancien Etat membre mais qui ne veut plus être dans le même écosystème juridique que nous*’.

If they do not, some recalibration of the relative influence of the legal and the political in the ‘very foundations’ of the Union would take place. This could be softened by attaching legacy legal effects to the situation of the UK as a *distinctive* third state – as a former Member State.¹²⁸ A positive consequence of this approach would be that the search for some sense of compromise, flexibility or limits in the make-up of autonomy would produce something tangible. The criticism that autonomy was ‘really’ more about the authority of the Court of Justice than the self-rule of the EU legal order would end up being confirmed. But a more complex and confident EU legal order, that stands for many things, would also be confirmed. Autonomy would remain an important structural principle of EU law but not an existential principle with such extreme implications. There is just something a bit depressing, though, about Brexit potentially succeeding where enriched protection for fundamental rights could not.

¹²⁸ Editorial comments, *supra* note 70, pp.15-16.